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No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS,

JOINT COMPLAINT IN INTERVENTION,

AND

BRIEF IN SUPPORT OF JOINT MOTION FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

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April 15, 1987

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Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District, by their attorneys, respectfully move the Court for leave to file a Joint Complaint in Intervention and for leave to intervene as Plaintiffs in this action pursuant to Rule 9.3 of the Rules of the Supreme Court of the United States for the reasons set forth in the accompanying brief.

Respectfully submitted this 15th day of April, 1987.

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JOINT COMPLAINT IN INTERVENTION

Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District ("the Districts") hereby jointly complain as follows:

Jurisdiction

1. The Court has jurisdiction over this action pursuant to Article III, Section 2 of the United States Constitution, as implemented by the Judiciary Act, 28 U.S.C. § 1251. The Court has retained jurisdiction over this action following its assumption of jurisdiction in *Nebraska v. Wyoming*, 325 U.S. 589, 665, 671-72 ¶ XIII.

Parties

2. Plaintiff, the State of Nebraska, and defendants, the State of Wyoming and the State of Colorado, are sovereign States of the United States of America.

3. The United States was granted leave to intervene as a party. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

4. Nebraska Public Power District ("NPPD") is the owner and operator of Federal Energy Regulatory Commission ("FERC") licensed Project 1835, a water resource project serving multiple public purposes, including generation of hydropower, provision of cooling water supplies for the Gerald Gentleman Station coal-fired power plant, and recreational benefits. Project 1835 consists of a network of diversion dams, canals, storage reservoirs and hydroelectric facilities located on the North Platte and South Platte Rivers upstream of the "Big Bend" Reach of the Platte River in Nebraska.

5. The Central Nebraska Public Power and Irrigation District ("Central District") is the owner and operator of FERC licensed Project 1417, a multiple use water resources project providing irrigation, hydropower, thermal cooling and recreational benefits. The Project consists of Lake McConaughy, Kingsley Dam and Kingsley Hydro on the North Platte River, the Tri-County Diversion Dam on the Platte River, and a network of storage reservoirs, canals and hydroelectric facilities offstream of the Platte River. Project 1417 is located immediately upstream of the Big Bend Reach of the Platte River in Nebraska.

6. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon") has moved to intervene in this action. Those motions are pending before the Court.

Claims For Relief

7. The Trust and Audubon seek intervention for the sole purpose of modifying and expanding the Court's Decree to change the uses of North Platte River water, the timing of those uses, and the geographic location of those uses.

8. The Districts rely upon the North Platte River water supply as it is apportioned in the existing Decree to operate their Projects in a manner that is best adapted to serve the public interest. The Districts support the State of Nebraska's action to enforce the terms of the existing Decree without modification.

9. Regulation of the North Platte River to provide instream flows in the Big Bend Reach of the Platte River would directly and substantially affect the Districts' Projects.

10. If the intervention motions of the Trust and Audubon are granted and issues relating to instream flows in the Big Bend Reach of the Platte River are considered, the Districts would have compelling interests in the Court's disposition of the case which could not adequately be represented by any other party to this action.

11. If the issues before the Court in this action are limited to those set forth in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief (and are not otherwise expanded to include consideration of instream flows in the Big Bend Reach) and the motions of the Trust and Audubon for leave to intervene are denied, the interests of the Districts could be represented by the State of Nebraska.

Wherefore, the Districts pray that the Court issue an order:

1. That the issues to be considered in this action be limited to those issues set forth in the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief;

2. That the motions of the Trust and Audubon for Leave to Intervene be denied;

3. That the Joint Motion for Intervention of the Districts be granted if the Court is to consider issues of instream flows in the Big Bend Reach of the Platte River;

4. That such other relief as is proper, necessary, and equitable be provided.

Respectfully submitted this 15th day of April, 1987.

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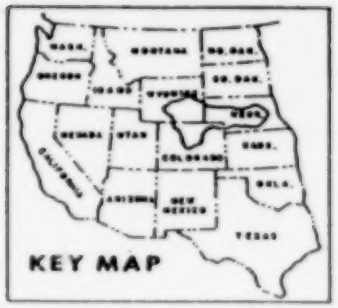
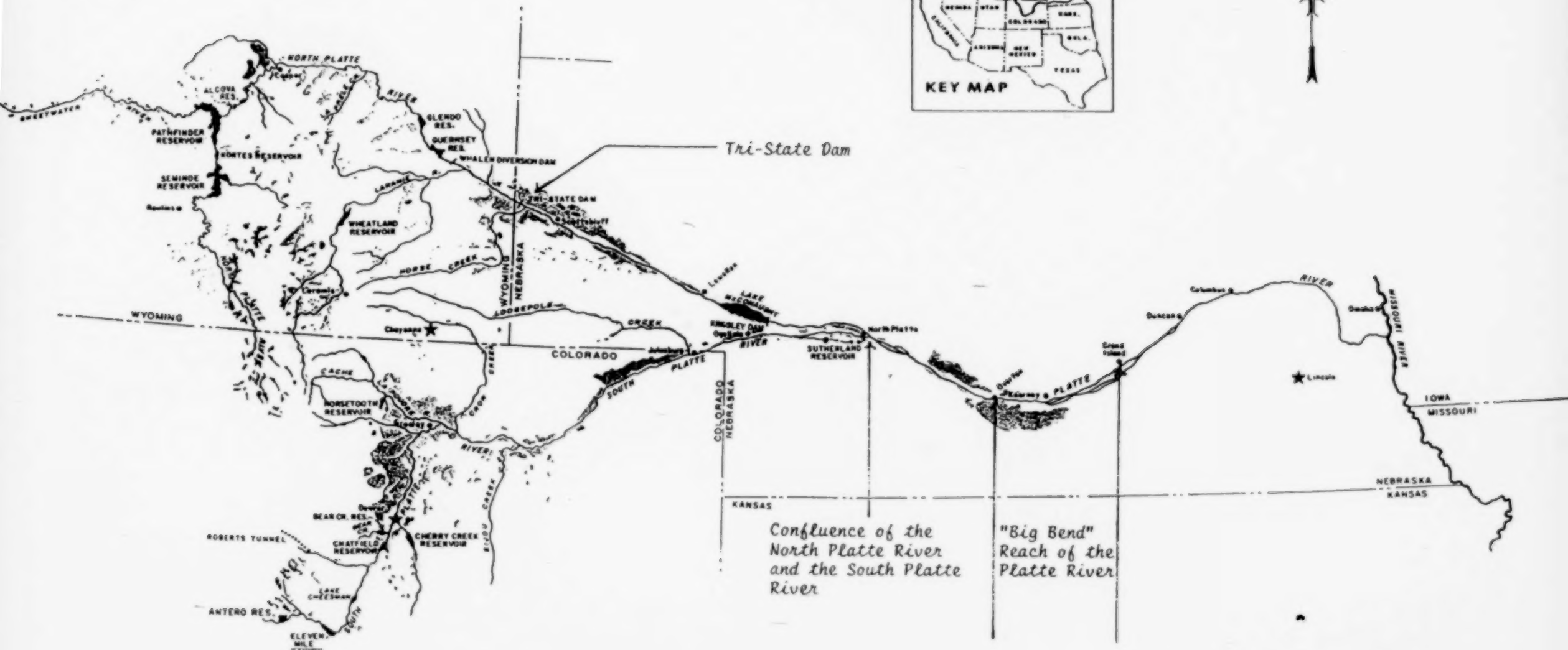
BRIEF IN SUPPORT OF THE JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

STATEMENT OF THE CASE

The State of Nebraska brought this action to enforce the Court's equitable apportionment of the waters of the North Platte River between the States of Wyoming and Nebraska. *See Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified and supplemented*, 345 U.S. 981 (1953) [hereinafter referred to as the "Decree"]. The Court's Decree apportions the natural flow of the North Platte River only for irrigation uses and only within the North Platte River Basin. The eastern boundary of the Court's natural flow apportionment is over 200 miles upstream of the Big Bend Reach of the Platte River. (Refer to Map of Platte River Basin Study Area on page 2 [hereinafter referred to as "Basin Map"].) Nebraska and





IRRIGATED LANDS

Adapted from:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
LOWER MISSOURI REGION
PICK-SLOAN MISSOURI BASIN PROGRAM

PLATTE RIVER BASIN STUDY AREA
COLORADO-WYOMING-NEBRASKA

DWG. NO. 1358-700-1 DEC. 1981

20 0 20 40 60
SCALE OF MILES

Wyoming ask only that the Court enforce the Decree according to its existing terms. The States have not petitioned the Court to modify the Decree to provide for other than irrigation uses of water, or to extend the geographic scope of the Decree, or to otherwise alter the States' equitable apportionment in any respect. *See* Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2; Wyoming Memorandum in Opposition to Intervention at 3.

Notwithstanding the limited scope of the Court's Decree and the intentions of Nebraska and Wyoming not to alter the Court's previous equitable apportionment, intervention is sought by the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon").

The States of Nebraska, Wyoming and Colorado oppose intervention by the Trust and Audubon because their intervention is inappropriate and unnecessary to resolve the dispute between Nebraska and Wyoming. Nebraska Memorandum in Opposition to Intervention by the Trust at 2-4; Nebraska Memorandum in Opposition to Intervention by Audubon at 2; Wyoming Memorandum in Opposition to Intervention at 2-3, 5-7, 9-11; Colorado Response to Trust and Audubon Motions at 1. The States also object because the Trust and Audubon seek to modify the Decree and raise extraneous issues that would unduly complicate and prolong the Court's resolution of this case. Nebraska Memorandum in Opposition to Intervention by the Trust at 3-4; Nebraska Memorandum in Opposition to Intervention by Audubon at 2; Wyoming Memorandum in Opposition to Intervention at 3-6, 15-16, 21.

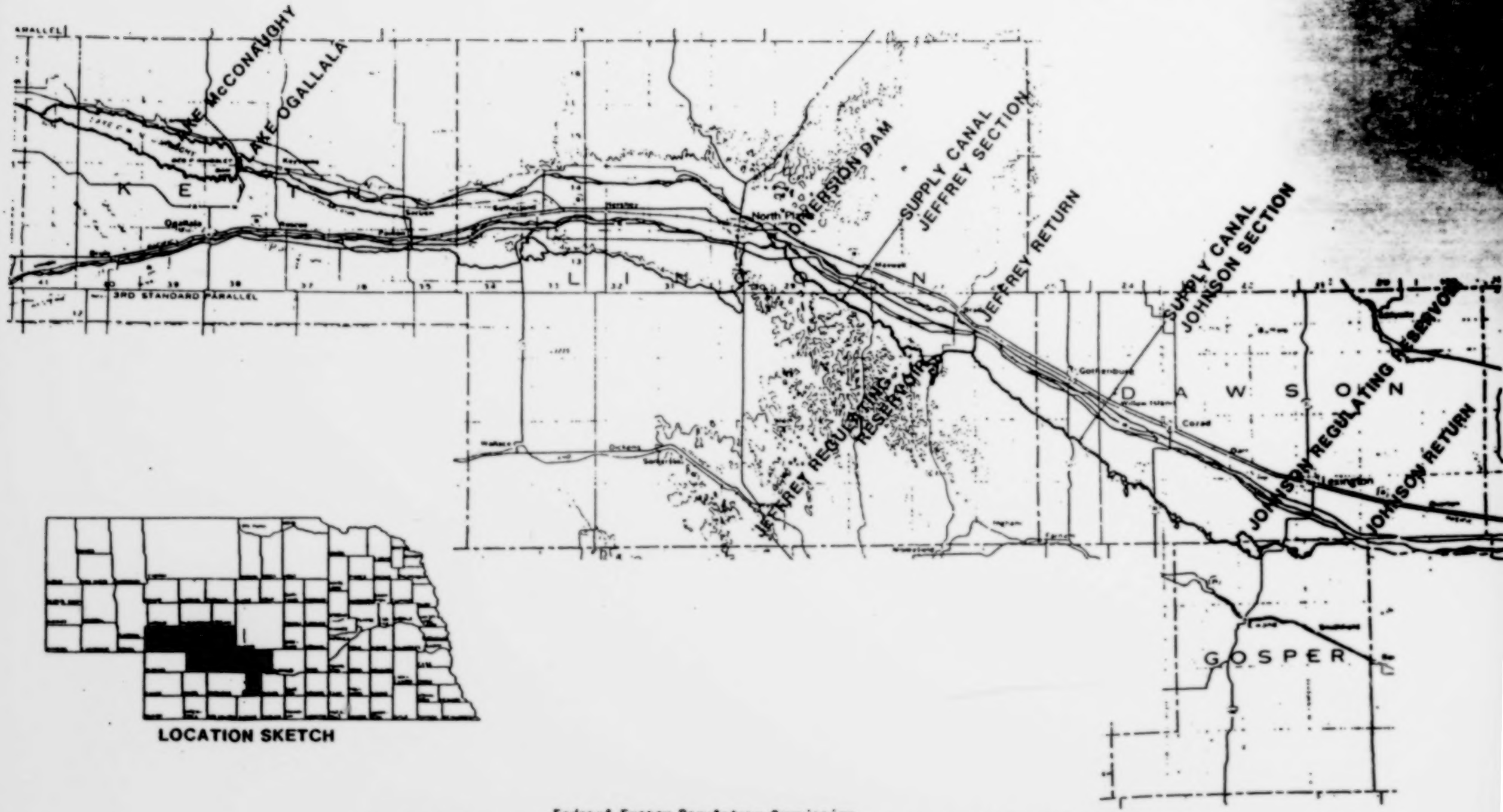
The Central Nebraska Public Power and Irrigation District ("the Central District") and Nebraska Public Power District ("NPPD") [hereinafter collectively referred to as "the Districts"] own and operate Federal

Energy Regulatory Commission ("FERC") Projects 1417 and 1835, respectively. Projects 1417 and 1835 are situated on the North Platte River, the South Platte River, and the Platte River between the Tri-State Dam and the Big Bend Reach of the Platte River.

The Districts, under Nebraska law, are public corporations and political subdivisions of the State of Nebraska. Neb. Rev. Stat. § 70-602 (Reissue 1981). The Districts operate as not-for-profit entities. The Central District is the largest irrigation district in Nebraska, providing irrigation water directly or indirectly to over 500,000 acres of land in central Nebraska. NPPD is Nebraska's largest electric utility, providing electric service directly or indirectly to more than 760,000 customers and serving 85 of the 93 counties in the State. Policies for the Districts are not set by the State government but by Boards of Directors who are independently elected from the geographic areas in Nebraska that are served by the utilities. Revenues for the Districts are derived from the sale of services to their customers. The Districts separately issue bonds for financing major capital investments and for other reasons. Neither the Central District nor NPPD has authority to levy taxes under Nebraska law, nor are the Districts supported by tax revenues.

The Central District's FERC Project 1417 includes Lake McConaughy on the North Platte River, the largest reservoir in the Platte River Basin. (Refer to Map of the General Project Area for Project 1417 on page 5 [hereinafter referred to as "Project 1417 Map"].) Other Project works include a network of dams, storage reservoirs, hydroelectric facilities and canals designed and operated principally for irrigation delivery and hydropower generation.

NPPD's FERC Project 1835 is located between Lake McConaughy and the Central District's diversion from



Federal Energy Regulatory Commission
From Application for New License for Major Project - Existing Dam Project No. 1417 (June 1984)

FIGURE 1. GENERAL PROJECT AREA

the Platte River. (Refer to Map of the General Project Area for Project 1835 on page 7 [hereinafter referred to as "Project 1835 Map"].) Project 1835 is designed and operated to divert water from the North Platte and South Platte Rivers for multiple public purposes, such as hydropower generation and the provision of cooling water for Gerald Gentleman Station, the largest electric generating facility in Nebraska. The Project facilities, which include a network of diversion dams, storage reservoirs, a hydroelectric facility and canals for the conveyance of water, also provide significant recreational benefits.

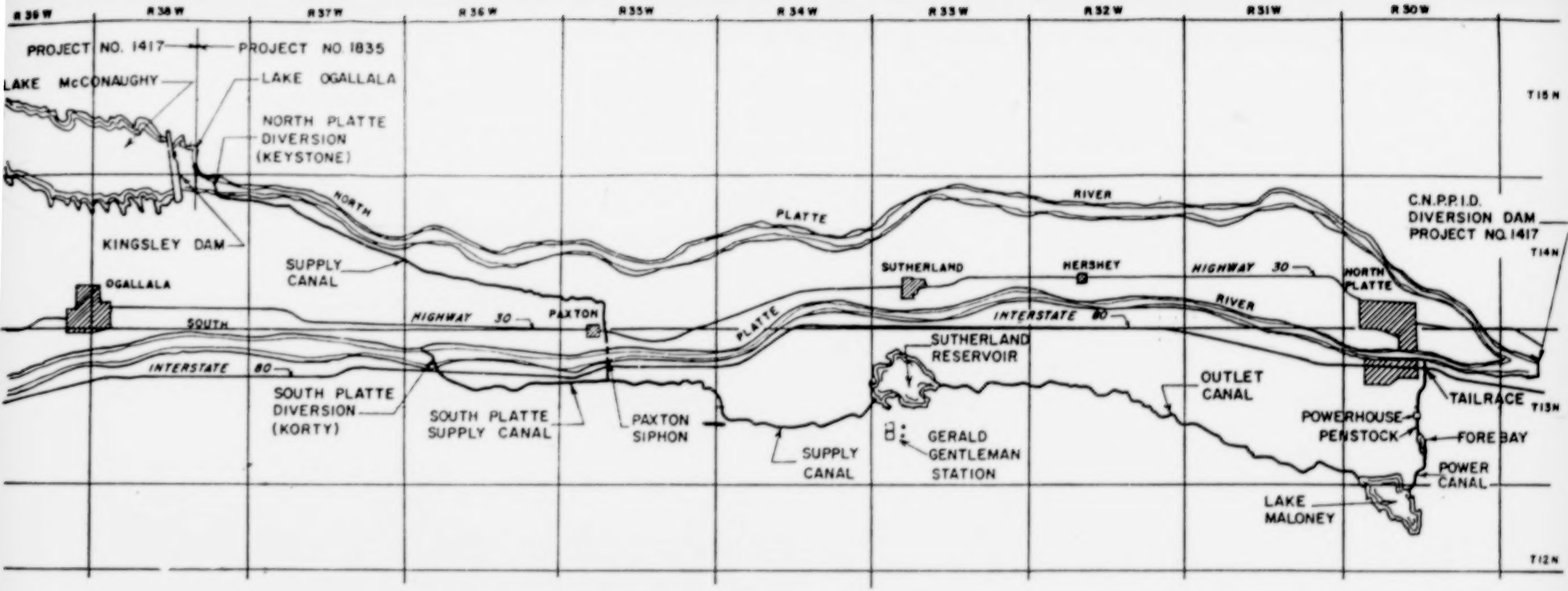
JURISDICTION

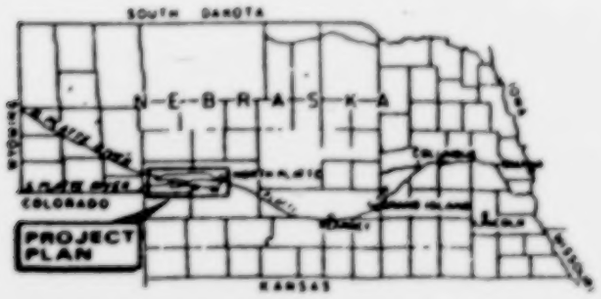
The Court's original and exclusive jurisdiction has been invoked by the State of Nebraska pursuant to Article III, Section 2 of the United States Constitution as implemented by the Judiciary Act, 28 U.S.C. § 1251(a) (1982). The Court has retained jurisdiction over this action pursuant to Paragraph XIII of the Decree, 325 U.S. at 671 ¶ XIII.

ARGUMENT

I. INTERVENTION BY THE DISTRICTS IS ESSENTIAL IF THE ISSUE BEFORE THE COURT IS THE EQUITABLE APPORTIONMENT OF THE WATERS OF THE NORTH PLATTE RIVER FOR USES IN THE BIG BEND REACH OF THE PLATTE RIVER BECAUSE SUCH A NEW APPORTIONMENT WOULD IMPAIR THE DISTRICTS' ABILITY TO OPERATE ITS FEDERALLY LICENSED PROJECTS

The sole reason that the Districts request intervention is because the Trust and Audubon have asserted new and different claims to North Platte River waters that would dramatically change the purpose and scope of the existing Decree and directly and substantially affect the Districts' Projects. In the event that the Court decides





VICINITY MAP

Federal Energy Regulatory Commission
From Application for New License for Major Project - Existing Dam Project No. 1835 (June 1984)

FIGURE 1. GENERAL PROJECT AREA

to address the issues presented by the Trust and Audubon, intervention by the Districts would be essential to enable the Districts to protect their interests.[1]

A. The Districts Have A Compelling Interest In The Court's Disposition Of This Case Because The Trust And Audubon Seek A New Apportionment Of North Platte River Waters That Would Directly And Substantially Affect The Property Rights Of The Districts

The Districts' FERC Projects 1417 and 1835 are designed and operated to maximize beneficial public uses of the waters of the North Platte, South Platte and Platte Rivers. The Projects are operated to provide irrigation water to a large segment of central Nebraska. In addition, the Projects are designed to use available water supplies to generate hydropower, provide cooling water supplies for the thermal generation of electricity at Gerald Gentleman Station and the Canaday steam electric plant, and to provide extensive recreational opportunities.

Lake McConaughy is the most important component of the Districts' Projects. It is located over 100 miles downstream from the Tri-State Dam on the North Platte

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[1] In 1935, the Platte Valley Public Power and Irrigation District ("Platte Valley"), NPPD's predecessor in interest, sought to intervene in the original dispute between the States of Nebraska and Wyoming. Platte Valley sought intervention because it feared that the Court's apportionment might deplete the water supply of the North Platte River such that Platte Valley could not feasibly operate Project 1835 and otherwise liquidate its outstanding financial obligations. Platte Valley Brief in Support of Motion to Intervention at 2-3 (Nov. 11, 1935). Platte Valley's request for intervention was denied by the Court. *Nebraska v. Wyoming*, 296 U.S. 548 (1935). As explained above, the instream flow apportionment issues posed by the Trust and Audubon, and the Districts' interests affected by a resolution of those issues, make this case legally and factually different from the 1935 action. *See, e.g., Mo-Kan Pipeline Co. v. United States*, 312 U.S. 502 (1941).

River and has a maximum storage capacity of approximately 1.9 million acre-feet. (Refer to Project 1417 Map for location of Lake McConaughy.) The Districts rely upon the storage water reserves in Lake McConaughy for the irrigation, hydropower generation and cooling water functions of the Projects.

Lake McConaughy is formed by Kingsley Dam. Water released from Kingsley Dam passes through Kingsley Hydro to generate hydropower. Kingsley Hydro became commercially operable in November, 1984, and represents an investment of approximately $49 million.

Immediately downstream of Kingsley Dam, NPPD diverts North Platte River water at the Keystone Diversion Dam. (Refer to Project 1835 Map for location of NPPD's facilities.) NPPD also diverts water from the South Platte River at the Korty Diversion Dam. The water diverted by NPPD is conveyed through a canal system to Sutherland Reservoir, where it is used for thermal cooling of the Gerald Gentleman Station power plant. FERC approved the use of Project 1835 facilities, particularly Sutherland Reservoir, for this purpose in 1976. The construction of Gerald Gentleman Station was completed by NPPD in 1981 at a cost of approximately $644 million. Releases from Sutherland Reservoir are conveyed to Lake Maloney, which serves as a regulating reservoir for the generation of hydropower at NPPD's North Platte Hydro and is a major recreation facility.

The Central District operates a diversion dam at the confluence of the North Platte and South Platte Rivers to divert water into its Supply Canal. (Refer to Project 1417 Map for location of the Central District's facilities.) The water diverted at the confluence is conveyed to a series of reservoirs where hydropower is generated by three hydroelectric facilities. During the irrigation season, the water diverted by the Central District also is delivered to three irrigation canals. In addition, Project

1417 provides cooling water for the Canady steam electric plant. At the far eastern end of the Central District's Project 1417, water is returned to the Platte River immediately upstream of the Big Bend Reach.

As the owners and operators of FERC Projects 1417 and 1835, the Districts have a vital interest in how the Projects are operated. The Districts have invested substantial sums in the Projects and derive revenues from the irrigation service, hydropower generation and thermal power generation functions of the Projects. The Districts clearly have a vested property interest in the facilities of Projects 1417 and 1835, the right to operate the facilities in a manner consistent with its license terms and conditions, and the revenues derived from Project operations. Indeed, these property interests are protected by the Federal Power Act which guarantees the Districts compensation in the event that the license to own and operate the Projects is transferred. *See* 16 U.S.C. §§ 807-808 (1982), *as amended by* the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, 1245-48 (1986).

This Court has long recognized that intervention in original actions is appropriate where the intervenor has a direct property interest at stake. *South Dakota v. Nebraska*, 434 U.S. 948 (1977) (intervention granted to landowner with interest in property); *Texas v. Louisiana*, 416 U.S. 965 (1974) (intervention granted to municipality with interest in property dispute); *Oklahoma v. Texas*, 258 U.S. 574 (1922) (intervention granted to private party with interest in property dispute). The Court has also permitted intervention where the Court's disposition of the case would directly affect a party's interest in its revenues. *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981) (intervention granted to gas pipeline companies subject to a tax being challenged). The Districts clearly meet these standards for intervention in this action.

Currently, the Court's equitable apportionment Decree does not restrict the District's storage or use of South Platte or Platte River waters for irrigation, hydropower generation or the provision of cooling water. Nor does the Decree impose constraints on the operations of Kingsley Dam or Kingsley Hydro or otherwise affect the Districts' right to store water in Lake McConaughy. The right to store and use water, consistent with State law, is central to the Districts' ability to operate the Projects for irrigation, hydropower, thermal cooling, and recreational purposes.

These rights would be lost, in whole or in part, if the Court adopts the Trust's and Audubon's requests. Both organizations claim that they seek to regulate North Platte River flows for uses in the Big Bend Reach of the Platte River. Although the precise methodology of achieving their goals is less than clear,[2] what is clear is that the Trust's and Audubon's objective to regulate North Platte River flows could not be accomplished without *de facto* regulating the Districts' Projects.

The Districts' Projects are the major water storage facilities between the Nebraska-Wyoming State line and the Big Bend Reach of the Platte River. Given the Projects' location and the fact that under most hydrologic conditions Kingsley Dam affects the flow of the North Platte River downstream to the confluence, it is physically impossible to regulate water from upstream sources (*e.g.*, sources in Wyoming or Colorado) for uses in the Big Bend Reach without passing this water through the Projects and altering the Projects' current operating regimes.

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[2] Audubon states candidly that they "cannot describe precisely" their role, but that they do want minimum water flows and release schedules. Audubon Brief in Support of Intervention at 10, n.10. The Trust requests a 365-day flow regime in the Big Bend Reach without suggesting how this would be accomplished. Trust Memorandum in Support of Intervention at 18-19.

Such regulation would necessitate costly changes in the mode of operating Kingsley Hydro resulting from modifications to Lake McConaughy reservoir release schedules to accommodate Big Bend Reach uses. In addition, the regulation of water for Big Bend Reach uses would impose substantial constraints on the Districts' use of North Platte River waters. If the Districts were required to bypass water released from upstream sources to assure delivery of the water in the Big Bend Reach, this water could not be stored in Lake McConaughy or other Project reservoirs. Bypassing water that would otherwise be stored by the Districts would greatly diminish the Districts' ability to maintain sufficient storage water reserves to satisfy irrigation demands, and would cause the Districts to suffer substantial reductions in the revenues derived from the generation of hydropower. Preventing the Districts' use of North Platte River waters could also jeopardize the cooling water supplies needed to operate Gerald Gentleman Station, possibly rendering Nebraska's largest electric generating facility inoperable for an extended period of time. In addition, bypassing water would affect the reservoir elevations in Lake McConaughy which are essential for maintaining the reservoir's extensive recreational opportunities.

Moreover, the Districts submit that the Trust is not merely seeking to regulate North Platte River flows, including the regulation of water through the Districts' Projects, but instead is requesting a huge increase in the volume of streamflow in the Big Bend Reach. *See* Trust Memorandum in Support of Intervention at 19 (profile of annual regulated streamflow in the Big Bend Reach sought by the Trust). The Districts' preliminary calculations show that the annual volume of flow sought by the Trust ranges from 1,000,000 to 2,400,000 acre-feet. By comparison, the average annual flow in the Big Bend Reach for the period 1935-1970 was only approximately 850,000 acre-feet.

Given the vast quantity of water sought by the Trust, it is inconceivable that the Districts' Projects would not be directly implicated if the issue of Big Bend Reach instream flows is addressed by the Court. In that context, the question immediately becomes one of apportioning the burden to supplement streamflow in the Big Bend Reach. Both the Trust and Audubon have already made clear their intentions to seek to require the Districts to provide instream flows for the Big Bend Reach.[3] In fact, Wyoming has already expressed its intention to seek instream flow releases from Lake McConaughy *in this action* if Big Bend Reach instream flow issues are to be considered. Wyoming Memorandum in Opposition to Intervention by the Trust and Audubon at 5-6 ("[e]quity also would require the Court to consider whether operation of . . . Lake McConaughy (Kingsley Dam) should be modified to assure delivery of regulated flows for migratory bird habitat").

The U.S. Bureau of Reclamation in 1982 conducted a study to evaluate the impacts on Lake McConaughy storage water reserves if the reservoir was operated to provide Big Bend Reach instream flows. U.S. Bureau of Reclamation, *Water Uses and Management in the Upper Platte River Basin* (Aug. 1982). The instream flows considered by the Bureau of Reclamation were considerably less than the flows sought by the Trust, yet the study concluded that:

> Impacts on existing uses of Lake McConaughy waters would be very substantial. For example, with this mid-May to mid-August demand at Overton for the 1941-1977 period, Lake McConaughy would be *severely depleted*, and a shortage of water for irrigation and power generation would occur. The simulation run shows that the lake would be *empty for 11 months* in the study period and end-of-month contents would average more than 33 percent below the present condition.
>
> By meeting these flow demands, the recreation use of the lake would be *severely curtailed.*

Id. at 63 (emphasis added).

The Districts thus have a most direct stake in any action that would affect the operations of the Projects. The regulation of the North Platte River sought by the Trust and Audubon in this action would have direct and substantial, if not severe, impact on Project operations and the Districts' revenues. If the interests of either the Trust or Audubon in Big Bend Reach instream flows are sufficient to warrant intervention, certainly the Districts' property interests in its Project facilities are equally, if not more, compelling.

B. The Districts' Ability To Protect Their Interests Would Be Substantially Impaired Unless The Districts Are Granted Intervention Because This Action Will Adjudicate The Districts' Rights Granted Under The Federal Power Act

The Districts' licenses to operate FERC Projects 1417 and 1835 expire in July and June 1987, respectively. At the present time, the Districts are seeking new licenses for the Projects in administrative relicensing proceedings before FERC. Pursuant to the comments received by the Districts from Federal and State wildlife agencies on the Districts' Applications for New License(s), an important issue before FERC will concern the instream flow requests for the Big Bend Reach of the Platte River.

Both the Trust and Audubon have stated publicly that they intend to intervene in the upcoming FERC proceed-

[3] *See, e.g.*, Letter from John G. VanDerwalker, Executive Director, Platte River Trust, to Raymond J. O'Connor, Then Chairman, FERC (Oct. 15, 1984) (the operation criteria for Kingsley Dam must meet the needs of the Big Bend Reach); Omaha World Herald, Mar. 23, 1987 (Audubon will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam).

ing to relicense the Districts' Projects.[4] The Trust, in fact, has filed a letter with FERC stating the Trust's view that FERC should require instream flow releases from Kingsley Dam as a term or condition of the Districts' new licenses for the Projects. *See* Letter from John G. VanDerwalker, Executive Director, Platte River Trust, to Raymond J. O'Connor, Then Chairman, FERC (Oct. 15, 1984).

In enacting the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), the Congress directly addressed the issue of operating the Projects for instream flow uses. The Congress explained, with respect to fish and wildlife agency recommendations to FERC, that any such instream flow requirement in the Districts' new licenses would be "expected by the conferees to be of a kind that will not significantly impair any of the existing projects' principal developmental purposes." H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 25 (1986). To protect the Congressionally recognized developmental purposes of the Projects, the Districts need to be parties to this action if the Court decides to address Big Bend Reach instream flow issues.

This Court has granted intervention in original actions where the Court's disposition of the case would impair or impede the intervenor's ability to protect its interests. *See Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (intervention granted to a State claiming the right to escheat property); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (intervention granted to landowners whose rights to property would be directly affected by the Court's ruling). In this case, any ruling by the

[4] Omaha World Herald, Mar. 23, 1987 (Audubon will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam); Omaha World Herald, June 21, 1985 (Trust will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam).

Court on the issue of instream flows for the Big Bend Reach would be certain to have a direct bearing upon FERC's consideration of this same issue in the relicensing proceedings for the Districts' Projects. The Districts have a vital interest in FERC's resolution of this issue because it will dictate the terms and conditions of the Districts' new licenses, which under current FERC policy would run for a term of thirty to fifty years. The Districts' ability to protect its interests before FERC will be substantially impaired unless the Districts are permitted to participate and protect those interests should they be litigated, directly or indirectly, in this action.

C. The Districts' Interests Would Not Be Represented Adequately By The Existing Parties Because No Other Party Has The Same Federally Imposed License Obligations Or Project Operation Experience

As the Federal licensees of FERC Projects 1417 and 1835, the Districts alone are authorized to operate the Projects and are charged with the obligation to operate the Projects in compliance with the terms and conditions of their FERC licenses. The Districts have an independent obligation to their customers to maintain the integrity of Project operations, which cannot be performed or safeguarded effectively by other parties. In addition, the Districts have over 45 years of experience in operating the Projects and are in the best position to explain to the Court the full range of impacts on Project operations that would result from the regulation of North Platte River flows for Big Bend Reach uses.

In this action, the Districts clearly could not be represented by the States of Wyoming or Colorado because both States have already taken a position that is adverse to the Districts' interests. *See* Wyoming Memorandum in Opposition to Intervention at 5-6 (claiming that

equity would require the Court to consider regulating the Projects to provide instream flows); Colorado Response to Trust and Audubon Motions (adopting the position of Wyoming). Nor could the United States simultaneously represent the Districts' interests in this action and regulate the Districts' Projects through FERC because of an inherent conflict of interest.

Finally, the State of Nebraska could not adequately represent the Districts' interests because the State is not licensed to operate the Districts' Projects, does not have an obligation to ensure that the Projects are operated in compliance with the terms and conditions of the Projects' current and future FERC licenses, and cannot represent the Districts in the FERC relicensing proceedings where the same instream flow issues will be addressed. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 338-39 (1958), this Court noted that a licensee's obligations under the Federal Power Act are distinct from, and in some instances may supercede, the public interests of a State. It follows, therefore, that a State cannot properly represent a licensee whose Federal Power Act obligations may require the licensee to take a position that conflicts with the State. Nor can the State of Nebraska adequately assure the Districts that the positions adopted by the State in this action will fully protect the Districts' interests in the FERC relicensing proceedings. *See, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 (1970) (private party granted intervention because the United States could not adequately represent both the general public interest and the private party's specific interests).

The Court has granted intervention to enable parties with substantial interests in original actions to intervene and speak for themselves even when the intervenor's State is already a party. *United States v. Alaska*, 465 U.S. 1018 (1984) (Eskimo tribe granted intervention); *Maryland v. Louisiana*, 451 U.S. 725, 745-46, n.21

(1981) (pipeline companies granted intervention); *Texas v. Louisiana*, 416 U.S. 965 (1974) (municipality granted intervention); *Illinois v. Indiana*, 322 U.S. 714 (1944) (private company granted intervention); *Ex Parte Texas*, 314 U.S. 582 (1941) (private gas company granted intervention); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (private landowners granted intervention).

In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court denied intervention by the City of Philadelphia because the City had not shown that its interests were not adequately represented by the State of Pennsylvania, a party in the case. *Id.* at 372-74. At issue in the case were the respective rights of the States of New York, New Jersey and Pennsylvania to waters of the Delaware River. The City of Philadelphia's purported interest was to ensure that sufficient quantities of water were available for the City's municipal uses. Philadelphia Motion to Intervene at 3-4 (Dec. 10, 1951). The City's interest, however, was identical to and adequately represented by the State because the State was interested in obtaining the maximum possible apportionment for all of its citizens, including those citizens served by the City. 345 U.S. at 373-74.

If the Court in this case decides to take up the new issues raised by the Trust and Audubon, the ruling in *New Jersey v. New York* would be inapposite. Unlike the Districts, the City of Philadelphia did not have independent Federal license responsibilities. Unlike this action, in *New Jersey v. New York* there was no attempt to regulate the flow of water through the City of Philadelphia's facilities. Nor was any consideration given to imposing constraints on the operations of the City's facilities.

Here, in contrast, the expansion of the Court's Decree sought by the Trust and Audubon would bring the Dis-

tricts' Projects within the scope of the Decree. Regulating North Platte River flows for Big Bend Reach uses would amount to a *de facto* regulation of the Projects and would have a direct and substantial, if not severe, impact on the operations of the Projects and the existing services provided to the Districts' customers.

In conclusion, the Districts have a compelling interest in the Court's disposition of the claims raised by the Trust and Audubon. The Districts' intervention is consistent with the Court's standards and rulings regarding intervention in original actions. The Districts' interests could not be adequately represented by the State of Nebraska or other parties in this action. The Districts should be permitted to speak for themselves and protect their own interests if the Trust and Audubon are granted leave to intervene or the Court decides to address Big Bend Reach instream flow issues.

II. THE TRUST AND AUDUBON SHOULD BE DENIED INTERVENTION BECAUSE THEY SEEK TO LITIGATE CLAIMS THAT ARE NOT PROPERLY BEFORE THE COURT AND HAVE NOT OTHERWISE PRESENTED COMPELLING REASONS TO JUSTIFY A NEW APPORTIONMENT OF NORTH PLATTE RIVER WATERS

The Districts concur with the States of Nebraska, Wyoming and Colorado that the intervention requests of the Trust and Audubon should be denied. The Trust and Audubon seek intervention to litigate new and different issues that are far beyond the scope of the Court's Decree and have no bearing on the actual dispute between Nebraska and Wyoming. The Court's rulings on such requests stand as precedent against such an attempt to expand the jurisdictional controversy between two sovereign States. Moreover, no compelling reason has been offered by the Trust or Audubon for departing from that precedent.

A. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because Their Claims Are Outside The Scope Of The Controversy Between The States Of Nebraska And Wyoming

This Court has original and exclusive jurisdiction of "controversies between two or more States." 28 U.S.C. § 1251(a) (1982) (implementing Article III, Section 2 of the United States Constitution). The jurisdictional controversy between the States in this action is the dispute between Nebraska and Wyoming. That dispute is over the States' respective rights to use North Platte River waters for irrigation uses under the existing terms of the Court's Decree. The Decree does not address the subject of instream flows in the Big Bend Reach of the Platte River. The responses of Nebraska and Wyoming to the intervention motions of the Trust and Audubon state plainly that the issue of Big Bend Reach instream flows is not in dispute between the States.

In *Utah v. United States*, 394 U.S. 89 (1969), the Court denied intervention to a private party because it sought to "introduce new issues which have not been raised by the sovereigns directly concerned." *Id.* at 96. In this action, the Trust and Audubon seek intervention not to assist the Court in resolving the narrow dispute between Nebraska and Wyoming, but rather to assert on their own behalf new claims pertaining to a different use of water, during different times of the year, in a different river. The obvious purposes of their intervention are to:

- *modify the geographic scope of the Court's Decree* to acquire river flows for the Big Bend Reach of the Platte River, which is over 200 miles downstream from the Tri-State Dam, the easternmost boundary of the Court's apportionment of North Platte River natural flow waters. Trust Motion to Intervene at 1; Trust Memorandum in Support of

Motion to Intervene at 1, 10, 13, 15-20; Trust Complaint in Intervention at 5-7; Audubon Brief in Support of Motion to Intervene at 10, n.10.

- *modify the purpose of the Decree* by requesting an apportionment of water that is not intended for irrigation uses, but for "instream" uses in the Big Bend Reach of the Platte River. Generally, instream use means the presence of water, generally in certain quantities at specified times, in a particular reach of a river or stream for fish, wildlife, or recreational purposes. Trust Motion to Intervene at 1; Trust Memorandum in Support of Motion to Intervene at 1, 10, 15; Audubon Brief in Support of Motion to Intervene at 10.

- *modify the timing of the Decree's apportionment* by expanding the May 1-September 30 irrigation season of North Platte River natural flow waters into a full, 365-day flow regime. Trust Memorandum in Support of Motion to Intervene at 19.

Indeed, the changes in the nature of the use, the volumes of water involved, the timing of the use, and the location of the use of the water sought by the Trust and Audubon demonstrate that they are asking the Court *for a wholly new apportionment of interstate water.*

The *Utah* holding applies here. The Trust and Audubon seek to create a controversy that does not exist between Nebraska and Wyoming and then invoke the Court's original and exclusive jurisdiction to resolve that controversy at the expense of the States' sovereign interests. The intervention motions of the Trust and Audubon should be denied.

B. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because The Facts Alleged Do Not Establish Such A Real And Substantial Injury As To Warrant A New Apportionment Of North Platte River Waters

The Court has recognized the importance of imposing prudential limitations on the exercise of its original and exclusive jurisdiction. *See California v. Texas*, 457 U.S. 164, 168-69 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). In equitable apportionment actions, the Court requires the plaintiff State to "prove by clear and convincing evidence some real and substantial injury or damage" before the Court will act on the State's request for a new apportionment. *Idaho Ex Rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983).

The Trust's and Audubon's claims for relief would change the very purpose and scope of the Court's Decree and are the equivalent of a request for a new apportionment. These private entities, of course, lack any authority to request a new apportionment of the North Platte River. *See* Argument II.A, *supra.* But even if they had the requisite authority, the Trust and Aubudon failed to allege facts to warrant modification of the Decree and the establishment of a new apportionment scheme.

The Trust and Audubon seek to leave the impression that there is an undisputed environmental crisis of such proportions that compels intercession by this Court. The Trust, for example, claims that current Platte River conditions are "disastrous" for migratory birds. Trust Memorandum in Support of Intervention at 17. It also argues that the only effective way to preserve migratory bird habitat is to ensure that the flow of the Platte River follows its "natural pattern," presumably meaning without human influence. *Id.* at 18.

The Trust does not note that bald eagles, a new species to the Platte River area, are recovering so well that the U.S. Fish and Wildlife Service stated that "[t]here is agreement everywhere that the eagle is not only recover-

ing, but that it could possibly reach at least the 'threatened' level nationwide in a few years." *See* 52 Fed. Reg. 2,240 (1987) (proposed January 21, 1987). In addition, the Trust does not refer to data showing that Interior least tern populations have apparently increased in Nebraska during the period 1975-1982. *See* Ecological Analysts, Inc., *An Evaluation of Historical Flow Conditions in the Platte River as Related to Vegetation Growth and Use by the Endangered Whooping Crane and Bald Eagle and the Threatened Interior Least Tern* 5-5, 5-6 (Sep. 1983). The Trust also does not mention that the sandhill cranes that stage on the Platte River are so abundant that hunting seasons for the cranes have been established in the Central Flyway by the U.S. Fish and Wildlife Service. *See* U.S. Fish and Wildlife Service Migratory Bird Hunting Regulations, 50 C.F.R. § 20.106 (1986). Nor does the Trust explain to the Court that there has been a consistent and dramatic increase in the whooping crane's population over the past 46 years despite the alleged "disastrous" changes in Platte River channels. *See* EA Engineering, Science and Technology, Inc., *Migration Dynamics of the Whooping Crane with Emphasis on Use of the Platte River in Nebraska*, viii, 316 (Dec. 1985). In fact, the Trust does not explain that whooping cranes rarely use the Platte River as habitat, preferring instead to use the many thousands of acres of wetland and riverine habitat available throughout the Central Flyway. *Id.* at 3-18; M. A. Howe, *Habitat Use by Migrating Whooping Cranes in the Aransas-Wood Buffalo Corridor* (1985) (U.S. Fish and Wildlife Service unpublished manuscript). There simply is no compelling reason offered by the Trust or Audubon to justify an entirely new apportionment of the North Platte River among the States of Nebraska, Wyoming and Colorado.

More troubling, however, is the Trust's presentation, without qualification, of its streamflow profile which it asserts reflects the "annual regulated flows needed to avoid jeopardizing migratory bird habitat in the Big Bend Reach of the Platte River." Trust Memorandum in

Support of Intervention at 19. The Trust suggests that its streamflow profile is an accepted scientific fact. It is not. Except for the Trust itself, the Trust's streamflow profile has not been accepted by any party, Federal agency, State agency, or court of law.

The Trust and Audubon seek extraordinary relief when no relief is necessary. They would have the Court intercede to reapportion an interstate river between two States against the very wishes of those States. The Trust's and Audubon's requests for intervention should be denied.

CONCLUSION

The scope of the issues to be decided in this action should be limited to those identified by Nebraska in its Petition For An Order Enforcing Decree And Injunctive Relief. The presence of the Trust and Audubon is unnecessary to resolve the controversy between Nebraska and Wyoming. Therefore, the motions for leave to intervene filed by the Trust and Audubon should be denied. If the Court decides, however, to consider instream flow issues for the Big Bend Reach of the Platte River, the Districts respectfully request that they be granted intervention.

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